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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

McLEODUSA TELECOMMUNICATIONS
SERVICES, INC.

Petition for Preemption of Nebraska Public
Service Commission Decision Permitting
Withdrawal of Centrex Plus Service by
U S WEST Communications, Inc.

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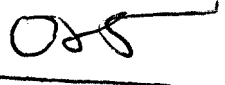
CC Docket No. 98-84

COMMENTS OF
McLEODUSA TELECOMMUNICATIONS SERVICES, INC.

McLeodUSA Telecommunications Services, Inc. ("McLeodUSA"), by undersigned counsel, respectfully submits its comments on the *ex parte* submission of U S WEST Communications, Inc. ("U S WEST") in the above captioned proceeding, pursuant to *Public Notice*, DA 98-1732 (released September 3, 1998).

The assertions made by U S WEST in its *ex parte* submission are without merit and are merely intended to divert the Commission's attention from the fact that McLeodUSA and other resellers are still prevented from entering the Nebraska local exchange market as a result of anticompetitive conditions caused by U S WEST's withdrawal of Centrex. Contrary to U S WEST's claim, a ruling by the Commission in McLeodUSA's favor would not reverse the Nebraska Supreme Court's decision, nor would it give McLeodUSA newfound standing under *state law* to challenge again the Centrex withdrawal before the Nebraska Public Service

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Commission ("PSC").¹ McLeodUSA asks the Commission to preempt, pursuant to section 253 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 ("1996 Act"),² a barrier to entry erected when the Nebraska PSC allowed U S WEST to withdraw its Centrex services without taking into consideration any anticompetitive considerations pursuant to section 251 of the 1996 Act.³ McLeodUSA's Petition for Preemption does not ask the Commission to rule on whether McLeodUSA has standing to challenge that withdrawal in a state forum under *state law*, but rather to rule on whether the Nebraska PSC's decision to allow U S WEST to withdraw Centrex is anticompetitive and inconsistent with *federal law*. A favorable ruling would merely confirm that whenever a state erects an anticompetitive barrier to entry carriers can look to this Commission for relief under *federal law*, whatever their certification status.⁴

¹ U S WEST Supplemental Response, filed Aug. 21, 1998, at 3; *See McLeod Telemanagement, Inc., et al. v. U S WEST Communications, Inc.*, Case No. S-97-112 (Neb. Supreme Ct., Aug. 14, 1998). The Nebraska Supreme Court found that McLeodUSA and the other competitive carriers lacked standing to file complaints at the Nebraska Public Service Commission because they were not certificated to provide local telephone service in Nebraska. *Id.* at 4.

² 47 U.S.C. § 253(d) (1996).

³ *Id.* at §§ 251(b)(1), (c)(4); *see* McLeodUSA Telecommunications Services, Inc., Petition for Preemption, Declaratory Ruling and Injunctive Relief, filed May 29, 1998 ("Petition for Preemption"); *In the Matter of McLeod Telemanagement, Inc.; MCI Telecommunications Corp.; and AT&T Communications of the Midwest, Inc. vs. U S WEST Communications, Inc.*, Docket Nos. FC-1252, FC-1253, FC-1254, Opinions and Findings (Neb. PSC Nov. 25, 1996) ("*Nebraska Order*").

⁴ Indeed, it would make little sense to find that a carrier cannot challenge a barrier to entry pursuant to section 253 without first being certificated in the state that has erected the barrier. This is especially true where, as in Nebraska, local exchange competitors were not generally allowed to be certified prior to the 1996 Act; Nebraska law allowed such competition only upon a showing that the area in question was not receiving reasonably adequate service. *See*

Because Nebraska law does not require affirmative action by the Nebraska PSC,⁵ the only order approving U S WEST's withdrawal of Centrex is the Nebraska PSC's denial of McLeodUSA's complaint challenging the withdrawal. The decision of the Nebraska Supreme Court may have effectively vacated this order, but the fact that McLeodUSA and other carriers still cannot provide competitive local exchange service by reselling Centrex in Nebraska has not changed. By allowing U S WEST's withdrawal of Centrex to take effect without any examination of whether the 1996 Act barred the withdrawal, the Nebraska PSC violated section 253(a), which forbids any state from taking action that "may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."⁶ The failure of the Nebraska PSC to consider the anticompetitive implications of U S WEST's withdrawal of Centrex service prior to that withdrawal becoming effective erected a barrier that is just as significant and effective as any explicit prohibition on competitive entry.

Moreover, it is critical that the Commission rule on McLeodUSA's Petition for Preemption because McLeodUSA is barred from filing another complaint with the Nebraska PSC

Nev. Stat. § 75-604 as it existed prior to amendment in 1997.

⁵ According to the Nebraska PSC, U S WEST has been providing Centrex Plus service under the terms and conditions of a rate list. *Nebraska Order* at 5; see Neb. Rev. Stat. § 86-803. Rate lists *automatically* go into effect after ten days notice to the Nebraska PSC. *Id.* at §§ 86-803(1),(3). McLeodUSA has asserted that U S WEST's withdrawal of Centrex should have been provided for in a tariff subject to PSC approval, not a rate list, because the withdrawal encompasses changes in the terms and conditions of Centrex service. This argument was dismissed by the Nebraska PSC. *Nebraska Order* at 5. A tariff would have required an affirmative order of approval from the PSC and would not be subject to the time limitations for rate lists.

⁶ 47 U.S.C. § 253(a)(1996).

challenging U S West's withdrawal of Centrex. Complaints regarding rate lists must be filed within sixty days from the date notice of rate change was sent to affected subscribers for complaints regarding rate lists against companies with up to 50,000 access lines in service and within one hundred twenty days for companies with more than 50,000 access lines in service.⁷ The fact that McLeodUSA and others are barred from filing a new complaint highlights the need for this Commission to engage in a substantive examination of the failure of the Nebraska PSC to consider patently discriminatory and anticompetitive effects of U S WEST's withdrawal of Centrex services. Although carriers such as McLeodUSA who have successfully used Centrex resale to enter other local exchange markets are effectively precluded by US WEST's withdrawal of Centrex service from providing service in Nebraska, the issue of whether this withdrawal violates federal law has yet to be substantively examined by any regulatory or judicial authority. The Commission should step in where others have failed and ensure that the procompetitive provisions of the 1996 Act are adequately enforced by preempting the Nebraska PSC's decision to allow U S WEST's withdrawal of Centrex to become effective.

McLeodUSA urges the Commission resolve this matter expeditiously by ruling on McLeodUSA's Petition for Preemption rather than relying on the complaint of Enhanced TeleManagement, Inc.⁸ The Commission has already gone through two rounds of comments on McLeodUSA's Petition for Preemption and has established the record regarding preemption of Nebraska's decision to allow U S WEST to withdraw Centrex service. Indeed, most of the

⁷ Neb. Rev. Stat., § 86-803(3).

⁸ Enhanced TeleManagement, Inc. Verified Complaint, filed February 22, 1996.

parties that filed comments in this proceeding supported the preemption of the *Nebraska Order*.⁹

The longer the Commission takes to rule on the issue of US WEST's withdrawal of Centrex service the longer McLeodUSA and others will be prevented from providing competitive local exchange service in Nebraska. Accordingly, McLeodUSA renews its request that the Commission act without delay to preempt the decision of the Nebraska PSC and remove the barrier to competition imposed by U S West's withdrawal of Centrex services.

Respectfully submitted,

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Dated: September 24, 1998

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⁹ See Comments filed by the Association for Local Telecommunications Services; MCI Telecommunications Corporation; Frontier Telemanagement, Inc. and Advanced Telecommunications, Inc.; WorldCom, Inc.; the Telecommunications Resellers Association; and the Competitive Telecommunications Association.

CERTIFICATE OF SERVICE

I, Ruth Ann Hinson, hereby certify that a copy of the foregoing **Comments of McLeodUSA Telecommunications Services, Inc. in Docket No. 98-84** was sent to each of the following parties by U.S. mail, postage prepaid and as otherwise specified below on this 24th day of September, 1998.

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